82-893

Office - Supreme Court, U.S.
FILED
NOV 29 1982
ALEXANDER L. STEVAS
CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JACK C. STOLLER,

Petitioner,

v.

JOHN O. MARSH, JR.,

Respondent.

PETITION OF JACK C. STOLLER FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROY TESLER, ESQ.
113 Rowell Court
Falls Church, Virginia 22046
(703) 534-9300
Attorney for Petitioner

Washington, D.C. • THIEL PRESS • (202) 638-4521

QUESTIONS PRESENTED FOR REVIEW

1. In affirming in part and reversing in part the District Court's grant of defendant's motion for summary judgment in a Title VII case, may the appellate court resolve the question whether the federal employer's conduct amounted to a continuing violation when that issue had never been considered by the District Court, or should the Court of Appeals have remanded the case to the trial court for a determination of that, and other, disputed issues of material fact?

2. Is the Circuit Court's view of the doctrine of continuing violation in Title VII cases, as expressed in its opinion in this case, so far at variance with the view of another Circuit Court on this doctrine that the exercise of this Court's power of supervision is appropriate to ensure the adequacy and fundamental fairness of the judicial process in Title VII litigation?

3. Does the Circuit Court's sanction of the District Court's refusal to grant reconsideration under Rule 60(b), Federal Rules of Civil Procedure, deprive plaintiff of his right to due process of law where, after submission of the case to the District Court on motion for summary judgment, the District Court's decision in another case involving the same defendant gives rise to a different legal theory of recovery based upon the same facts?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW ..... (i)

TABLE OF AUTHORITIES ..... (iii)

PETITION OF JACK C. STOLLER FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT 1

OPINIONS BELOW 2

JURISDICTION 2

STATUTE INVOLVED 2

STATEMENT OF THE CASE 3

REASONS RELIED ON FOR GRANTING THE WRIT 7

ARGUMENT:

I. After Partially Reversing The Judgment Of The Trial Court, The Court Of Appeals Should Have Remanded The Case To That Court For Resolution Of The Continuing Violation Question And Other Disputed Issues Of Material Fact, Rather Than Attempting To Resolve Those Issues Itself On An Inadequate Record 10

II. The Decision Below Creates A Conflict In The Circuits As To Whether The Ongoing Operation Of A Federal Employer's Discriminatory Personnel Management Program Will Be Deemed A Continuing Violation Of Title VII For Whatever Period Of Time The Program Remains In Effect 13

III. Certiorari Should Be Granted To Settle The Question Whether A Motion For Reconsideration Brought Under Rule 60(b), FRCP, May Be Used To Amend The Complaint Where New Decisional Law Gives Rise To A Different Legal Theory Of Recovery Based Upon Preexisting Facts 17

CONCLUSION 23

APPENDICES: Page

A: Order of the United States Court of Appeals for the District of Columbia Circuit denying Appellant's Petition for Rehearing, entered August 30, 1982 . . . . . 1a

B: Opinion of the United States Court of Appeals for the District of Columbia Circuit, entered June 22, 1982 . . . . . 2a

C: Order of the United States District Court for the District of Columbia denying Plaintiff's Motion for Reconsideration, entered May 22, 1981 . . . . . 23a

D: Plaintiff's Motion for Reconsideration by the United States District Court, with Memorandum of Points and Authorities, filed May 8, 1981 . . . . . 25a

E: Order of the United States District Court for the District of Columbia granting Defendant's Motion for Summary Judgment and Dismissing Case, entered April 30, 1981, with Memorandum entered May 6, 1981 . . . . . 30a

TABLE OF AUTHORITIES

Cases:

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 9, 12

Bethel v. Jefferson, 191 U.S. App. D.C. 108, 598 F.2d 631 (D.C. Cir. 1978) 16

Campbell v. Campbell, 83 U.S. App. D.C. 257, 170 F.2d 809 (D.C. Cir. 1948) 11

Chisholm v. United States Postal Service, 665 F.2d 482 (4th Cir. 1981) 9, 16, 17

Clark v. Alexander, 489 F. Supp. 1236 (D.D.C. 1980), *aff'd in part and remanded in part on other grounds, sub nom. Clark v. Marsh*, 214 U.S. App. D.C. 350, 665 F.2d 1168 (D.C. Cir. 1981) 17, 18, 19, 20, 21, 23

Concerned Citizens of Vicksburg v. Sills, 567 F.2d 646 (5th Cir. 1978) 10, 22-23

DeMarco v. United States, 415 U.S. 449 (1974) 11

Cases, continued: Page

Fountain v. Filson, 336 U.S. 681 (1949) 8, 11, 12

Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) 18

General Electric Credit Corp. v. Robbins, 414 F.2d 208 (8th Cir. 1969) 11

Good Luck Nursing Home, Inc. v. Harris, 204 U.S. App. D.C. 300, 636 F.2d 572 (D.C. Cir. 1980) 21

Gordon v. National Youth Work Alliance, ___ U.S. App. D.C. ___, 675 F.2d 356 (D.C. Cir. 1982) 21

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 14, 18

Harjo v. Andrus, 189 U.S. App. D.C. 171, 581 F.2d 949 (D.C. Cir. 1978) 21

Hawkes v. IRS, 467 F.2d 787 (6th Cir. 1972) 22

Holton v. Crozer-Chester Medical Center, 560 F.2d 575 (3d Cir. 1977) 9, 21

In the Matter of Emergency Beacon Corp., 666 F.2d 754 (2d Cir. 1981) 21

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 18

Kelley v. Southern Pacific Co., 419 U.S. 318 (1974) 10

Korn v. Franchard Corp., 456 F.2d 1206 (2d Cir. 1972) 23

Lair v. Fauver, 595 F.2d 911 (3d Cir. 1979) 21

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 18

Patterson v. American Tobacco Co., 586 F.2d 300 (4th Cir. 1978) 9, 22

Poller v. Columbia Broadcasting System, 368 U.S. 464 (1962) 12, 13

Pullman-Standard v. Swint, ___ U.S. ___, 102 S. Ct. 1781 (1982) 8, 10

Shehadeh v. Chesapeake & Potomac Telephone Co., 193 U.S. App. D.C. 326, 595 F.2d 711 (D.C. Cir. 1978) 9, 15, 16

Cases, continued: Page

United States v. Cirami, 563 F.2d 26 (2d Cir. 1977) 21
United States v. Diebold, Inc., 369 U.S. 654 (1962) 8, 12
Yanish v. Barber, 232 F.2d 939 (9th Cir. 1956) 11

Statutes:

5 U.S.C. 105 3
28 U.S.C. 1254(1) 2
28 U.S.C. 1291 2
42 U.S.C. 2000e-16(a) 2

Other Authorities:

Rule 12, Federal Rules of Civil Procedure, 28 U.S.C. 21
Rule 25, Federal Rules of Civil Procedure, 28 U.S.C. 1
Rule 52, Federal Rules of Civil Procedure, 28 U.S.C. 10, 22
Rule 56, Federal Rules of Civil Procedure, 28 U.S.C. ...8, 10, 21
Rule 59, Federal Rules of Civil Procedure, 28 U.S.C. 20
Rule 60, Federal Rules of Civil Procedure, 28 U.S.C. ...9, 21, 22
5A Moore's Federal Practice ¶ 52.06[2] 11
Jackson and Matheson, "The Continuing Violation Theory and the Concept of Jurisdiction in Title VII Suits," 67 Georgetown Law Journal 811 (1979) 15

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JACK C. STOLLER,

Petitioner,

v.

JOHN O. MARSH, JR.,

Respondent.[1]

PETITION OF JACK C. STOLLER FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, Jack C. Stoller, appellant in the court below, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of

---

[1] There were no other parties to the proceedings below. Clifford L. Alexander, Jr., then Secretary of the Army, was the named defendant in the District Court. Since the filing of the Complaint, Mr. Alexander was replaced by Mr. John O. Marsh, Jr., as Secretary of the Army, and Mr. Marsh was substituted as defendant herein pursuant to Rule 25(d), Federal Rules of Civil Procedure (hereinafter FRCP).

Appeals for the District of Columbia Circuit entered in the above case on June 22, 1982. That decision affirmed in part and reversed in part the judgment of the United States District Court for the District of Columbia granting the defendant's motion for summary judgment and dismissing the case, which order was entered April 30, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals (App. B, *infra*, 2a-22a) is reported at 682 F.2d 971. That Court's order entered August 30, 1982, denying appellant's petition for rehearing (App. A, 1a), is unreported. The memorandum opinion of the District Court (App. E, 31a), entered May 6, 1981, in support of its order granting the defendant's motion to dismiss, or in the alternative for summary judgment, is unreported, as is the District Court's order denying plaintiff's motion for reconsideration, which order was entered May 22, 1981 (App. C, 23a).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit, exercising jurisdiction pursuant to 28 U.S.C. 1291, was entered on June 22, 1982. The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 717(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16(a), provides in pertinent part:

> All personnel actions affecting employees or applicants for employment . . . in executive agencies

(other than the General Accounting Office) as defined in section 105 of title 5 . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

Petitioner, Jack C. Stoller, was employed by the Department of the Army as a Civilian Personnel Management Specialist in the Department of the Army Career Program for Civilian Personnel Administration (hereinafter DA Career Program). Prior to obtaining his Army position, he had a similar job with the Navy Department. In March, 1967, he arrived in Saigon, Republic of Vietnam, to begin employment as a Civilian Personnel Management Specialist, Grade GS-11. Prior to his departure for Vietnam, he was advised that the normal and expected tour of duty for employees in Vietnam in positions analogous to his was of five years' duration, but that he would be eligible for home leave to see his family once every year. The vehicle for accomplishing these home leave trips was the execution of a document called "Renewal Agreement – Travel."

As soon as Petitioner arrived in Vietnam, he was subjected to a continuing barrage of hostile words and acts by certain of his co-workers and superiors in the Army's Civilian Personnel Directorate.

On his arrival in Saigon, he was not met and greeted at the airport, although it was his office's stated official policy to do so. He was made to stay for an unusually long period of time in quarters which had been deemed inadequate by the Army. Some of his co-workers refused to speak with him, and spurned his offers of companionship. Other co-workers made embarrassing and derogatory comments about Jewish dietary laws,

which they believed the plaintiff observed. He was denied information about and access to the International Club, to which certain of his supervisors and co-workers belonged. He was harassed by co-workers who stacked furniture against his chair and desk while he was seated and working there, and who would stealthily creep behind him and yell and scream in his ears. In early 1968, he was denied a promotion to Grade GS-12 for which he was admittedly eligible, and better qualified than the individual who was actually selected. Most significantly, perhaps, and in possible explanation of this rather bizarre series of occurrences, at a social gathering of his supervisors and co-workers, which Petitioner attended, one Robert Hall, a co-worker, was asked whether Petitioner was "that kike Stoller." Another co-worker was told by one of Petitioner's supervisors not to associate with Stoller because he was a Jew. Petitioner was, he believes, the only Jew in the Saigon Area Civilian Personnel Office during the period of his assignment there, although the Army was unwilling to admit this during the discovery phase of the case in the District Court.

Stoller acknowledged, in the proceedings below, that he was not at that time aware that the behavior patterns displayed toward him related to the fact that he is Jewish, because, while he was in Vietnam, he did not personally overhear, nor was he then informed of, the anti-Semitic and discriminatory remarks that were made about him.

In the spring of 1968, Stoller was told that he would not be receiving a "Renewal Agreement—Travel," which meant that he could stay in Vietnam and not see his family for the foreseeable future, or return to the United States and then be ineligible to go back to Vietnam,

because of the absence of any such renewal agreement. Plaintiff, mystified and deeply disturbed by this development, approached a co-worker and asked him to arrange a meeting with Mr. William Moyers, then Respondent's Civilian Personnel Director in Vietnam, to ascertain why this approach was being utilized to prevent his remaining in Vietnam. Eventually, Moyers met briefly with Stoller, but no reasons were given to explain the action that was being taken against him.

Confronted with this Hobson's Choice, Petitioner returned to the United States, against his will, as the allegedly unlawful *de facto* reassignment from Vietnam reduced his total annual compensation from approximately $28,000 to $12,000. His reassignment was to a similar position at the Army Materiel Command, Alexandria, Virginia.

Some eight or nine months later, at the end of 1968, Stoller applied for overseas employment with the Army, which was denied. This was the first time that he was made aware, by defendant's employees, that there was something in writing to the effect that he was unable to get along with foreigners. In 1972, he was informed that the 1971 Career Screening Panel (hereinafter CSP) had placed him in a "deferred" category. This meant that he was not then promotable. In 1973, he learned that the 1972 CSP had placed him in a "promotable" category, but had not recommended him for promotion. His promotion to GS-13 was effected only after his supervisor wrote a memo requesting it, after which the CSP belatedly gave the promotion its imprimatur of legitimacy. After Petitioner returned to the United States, and after being turned down for any overseas assignment,

he learned of the existence of a secret "file" on him which was maintained by respondent's employees.[2]

In 1973, after reflecting on the entire history of the Army's treatment of him between 1967 and that time, Stoller concluded that all the adverse action taken against him was attributable to religious discrimination originally occurring in Vietnam in 1967 and 1968, and the Army's continuing efforts at a "cover-up" of that unlawful discrimination.

On May 16, 1973, only two weeks after his belated promotion to GS-13, Stoller attempted to verify his new suspicion, and contacted the Army's Overseas Recruitment Center, which Center was a branch of the Army's Office of the Director of Civilian Personnel. He asked to see a list of names of those people who had been assigned to jobs in the Civilian Perosnnel Office in Vietnam from 1968 on. When this request was refused, Stoller immediately made an informal written complaint to an EEO counselor. Then, when the matter was not resolved informally, he filed his formal administrative complaint on June 14, 1973.

A lengthy administrative investigation was conducted. A panel of the (then) Civil Service Commission's Appeals Review Board, in May, 1978, affirmed the Complaints

---

[2] The Army has never admitted the existence of this file, and, in the District Court, resisted all plaintiff's efforts to ascertain the current address of a witness, Miss Almeida Huddleston, who made a sworn statement in the administrative proceeding herein that it existed. Stoller testified at his deposition that at a June 1969 meeting with Mr. William R. Bruce, who was then exercising supervisory responsibility over him vis-a-vis the Career Program, Bruce had a file containing what appeared to be several documents, one of which he quoted from, but which he refused to let Stoller see, clutching the file to his chest at one point to ensure that the contents thereof remained "secret"—at least from Petitioner.

Examiner's decision that there had been no unlawful discrimination, although the Examiner's Report acknowledged the "atmosphere of discrimination" to which Petitioner had been subjected while in Vietnam, and recommended corrective action. Within thirty days of the Board's decision, Jack Stoller filed the lawsuit which is the subject of this Petition.

Just as the discovery phase of this case was being completed in the trial court, defendant filed its motion to dismiss or, in the alternative, for summary judgment, in March 1980. Plaintiff's Opposition thereto, the Affidavit of Jack C. Stoller and a Statement of Genuine Issues were filed in April, 1980. The District Court granted summary judgment to the Government on all four of Stoller's claims.[3] (App. E, 30a).

On appeal, the Court of Appeals, *per* Judge Wright, affirmed the District Court's judgment on Stoller's first three claims, but further ruled that summary judgment was improper on Stoller's fourth (1972) claim. Stoller filed a timely Petition for Rehearing, which was denied without opinion on August 30, 1982 (App. A, 1a).

REASONS RELIED ON FOR GRANTING THE WRIT

The decision of the Court of Appeals for the District of Columbia Circuit, in itself resolving the question whether the Army's treatment of Stoller between 1967 and 1973 amounted to a continuing violation of Title

---

[3] (1) The 1968 refusal to allow him to complete his normal tour in Vietnam; (2) the denials in 1969 and 1970 of his applications for overseas assignment; (3) the 1971 Panel's decision that he was ineligible for promotion; and (4) the 1972 Panel's restriction of his promotional opportunities. Complaint at 3.

VII, without remanding the case to the District Court for requisite factual determinations, is violative of basic and well-established teachings of this Court, as enunciated in *Pullman-Standard v. Swint*, ___ U.S. ___, 102 S. Ct. 1781 (1982), *United States v. Diebold, Inc.*, 369 U.S. 654 (1962), and *Fountain v. Filson*, 336 U.S. 681 (1949).

As the Court of Appeals decision does not recognize, the District Judge never resolved the issue whether Respondent's treatment of Stoller during the period in question constituted a continuing violation of his rights under Title VII (District Court's Memorandum, App. E, 31a).[4] Thus, the proper course for the Court of Appeals to have followed would have been to remand the case to the District Court for factual determinations under Rule 56(d), F.R.C.P., rather than to arrogate unto itself the role and function of the trial court in attempting to resolve the ultimate fact question in the case (whether the Army's treatment of Petitioner violated his rights under Title VII), and other disputed issues of material fact which had not been resolved prior to the trial court's granting summary judgment. Moreover, in treating questions of fact as questions of law, which Petitioner submits is essentially what the Court of Appeals panel did, one of the most basic tenets of our judicial system was ignored, in that the panel failed to view the facts, and inferences to be drawn therefrom, in the light most favorable to the party opposing the motion for summary

---

[4] The only reference made by the District Judge to the issue whether the Army had committed a continuing violation is found at App. E, on p. 34a of the Court's memorandum, where the judge merely took note of the fact that Stoller had alleged a continuing violation.

judgment, *contra* to the teaching of *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970).

The decision below also appears to create a conflict in the federal judicial circuits as to the question whether the ongoing operation of a federal employer's discriminatory personnel management program will be deemed a continuing violation of Title VII for whatever period of time the program remains in effect. The Fourth Circuit decided, in *Chisholm v. United States Postal Service*, 665 F.2d 482 (4th Cir. 1981), that the programmatic aspect of the employer's promotion practices meant that the violation would be deemed continuing, so as to permit recovery for violations occurring before March 24, 1972 (the effective date of the Title VII amendments which extended the forum and procedures of the Civil Rights Act to federal employees) by employees who had no discrimination claims pending on that date. The Court of Appeals decision in the instant case is not only sharply at variance with *Chisholm*, but also represents a departure from the preexisting law of the circuit, as exemplified by Shehadeh m m m m m m m m m m m 193 U.S. App. D.C. 326, 595 F.2d 711 (D.C. Cir. 1978).

Finally, the District of Columbia Circuit's opinion decided an important question of federal law which has not as yet been, but should be, settled by this Court—to wit, whether a motion for reconsideration under Rule 60(b), F.R.C.P., is an acceptable method for seeking to amend a complaint where new decisional law gives rise to a previously unknown legal theory of recovery based on preexisting facts. The court below answered this question in the negative, in a manner which apparently conflicts with Court of Appeals decisions in the Third (*Holton v. Crozer-Chester Medical Center*, 560 F.2d 575 (3d Cir. 1977)), Fourth (*Patterson v. American Tobacco Co.*, 586 F.2d 300 (4th Cir. 1978)), and Fifth

(*Concerned Citizens of Vicksburg v. Sills*, 567 F.2d 646 (5th Cir. 1978)) Circuits.

I.

AFTER PARTIALLY REVERSING THE JUDGMENT OF THE TRIAL COURT, THE COURT OF APPEALS SHOULD HAVE REMANDED THE CASE TO THAT COURT FOR RESOLUTION OF THE CONTINUING VIOLATION QUESTION AND OTHER DISPUTED ISSUES OF MATERIAL FACT, RATHER THAN ATTEMPTING TO RESOLVE THOSE ISSUES ITSELF ON AN INADEQUATE RECORD.

Although the *Pullman-Standard* case, *supra*, involved Rule 52, F.R.C.P., and this case involves Rule 56, the governing principle is, and ought to be, the same. This Court there directed that where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits of only one resolution of the issue (102 S. Ct. 1781, 1792; *Kelley v. Southern Pacific Co.*, 419 U.S. 318 (1974)).

Numerous significant factual issues were in dispute at the time the Army's motion for summary judgment was granted. Stoller maintained that Mr. William Bruce informed the 1971 and 1972 CSPs of information contained in the secret file. Respondent denies this, and also denies the existence of any such file.

Mr. Virgil E. (Gene) Stephens, a fellow employee of plaintiff's in Vietnam, submitted an affidavit in the administrative proceeding in this case stating that he had heard several of plaintiff's supervisors use ethnic (religious) epithets against plaintiff. As noted in plaintiff's Statement of Genuine Issues submitted in the District Court, the Army seems even to be denying that the affidavit was in fact Mr. Stephens'.

During the course of the administrative proceeding, Mr. Robert Hall, another of Stoller's co-workers in Vietnam, testified that one of his (Hall's) superiors in the civilian hierarchy advised him not to associate with Stoller because he was a Jew. Although the Army admitted that Mr. Hall so testified, it denied that the testimony was truthful.

These examples have been included to show that there were many issues of material fact which remained in dispute at the time the District Court granted the summary judgment motion. The Court of Appeals acted improperly in attempting to resolve them. *DeMarco v. United States,* 415 U.S. 449 (1974). Resolution of fact issues, including the proper inferences to be drawn from the facts, should be made by the trial court. *General Electric Credit Corp. v. Robbins,* 414 F.2d 208, 211 (8th Cir. 1969). "It is not the function of this court to make findings of fact which a trial court should have made." *Yanish v. Barber,* 232 F.2d 939, 946 (9th Cir. 1956). *Campbell v. Campbell,* 83 U.S. App. D.C. 237, 170 F.2d 809 (D.C. Cir. 1948); 5A Moore's Federal Practice ¶ 52.06[2].

The significance of *Fountain v. Filson, supra,* to the case at bar cannot be over-emphasized, and represents the controlling precedent by which the Court of Appeals' action here should be judged. In that case, this Court held that where the only claim considered by the District Court on defendant's motion for summary judgment was a claim that there existed a resulting trust, and the Court of Appeals concluded that the District Court should have considered a personal injury claim, the Court of Appeals erred in depriving defendant of the opportunity to dispute facts which were material to the personal injury claim by ordering summary judgment against defendant.

The Court of Appeals committed the same error here as it did in *Filson*—by concluding that the facts as they existed of record at the time the District Court granted the summary judgment motion did not support plaintiff's allegations that the operation of the DA Career Program amounted to a continuing violation, the Circuit Court effectively deprived Stoller of the opportunity to have that issue resolved by the tribunal properly charged with resolution of disputed factual issues. The Court of Appeals' resolution of the question by fiat is particularly egregious in view of the fact that the District Court had not considered the continuing violation question while the matter was pending in that court.

Pages 7 and 8 (Slip Opinion) of the opinion below (App. B, 8a & 9a) state the panel's conclusion that Stoller's allegations concerning the secret file, even if proven, would not establish a continuing violation of Title VII, in that "they do not adequately link four separate episodes of alleged discrimination into a single, continuous policy" (8a). The discussion which follows and attempts to support this conclusion, however, appears to be a series of factual, not legal, assertions. In resolving these issues of fact in a manner adverse to Petitioner's assertions, the appellate tribunal has itself violated the precepts of *Adickes v. S. H. Kress & Co., supra,* where this Court reaffirmed its holding in *Diebold, supra,* that on summary judgment, the inferences to be drawn from the underlying facts contained in matters in evidence in the trial court must be viewed in the light most favorable to the party opposing the motion (398 U.S. 144, 158-59: "We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude here that it should not have been granted", *Poller v. Columbia Broadcasting System,* 368 U.S. 464, 473 (1962)).

Petitioner submits that the Court of Appeals' opinion here goes through the motions of saying that the panel has accepted the most favorable view of Petitioner's allegations, but in the proverbial next breath it refutes that by resolving adversely to the Petitioner questions which were hotly contested and unresolved during discovery in the trial court.

In conclusion, in the words of the *Poller* Court's opinion, "it may be that upon all of the evidence a jury would be with the respondents. But we cannot say on this record that 'it is quite clear what the truth is.'" 368 U.S. 464, 472.

II.

THE DECISION BELOW CREATES A CONFLICT IN THE CIRCUITS AS TO WHETHER THE ONGOING OPERATION OF A FEDERAL EMPLOYER'S DISCRIMINATORY PERSONNEL MANAGEMENT PROGRAM WILL BE DEEMED A CONTINUING VIOLATION OF TITLE VII FOR WHATEVER PERIOD OF TIME THE PROGRAM REMAINS IN EFFECT.

As previously noted, the Court of Appeals' opinion states that even if Petitioner were to prove his allegation that a secret file was created to cover up the Army's illegal action in removing him from Vietnam, and then was used to deny him overseas assignments from 1969 on, promotable status in 1971 and a promotion in 1972, it would not establish a continuing violation of Title VII, as there would still be no adequate linkage of four separate episodes of alleged discrimination into a single, continuous policy. Petitioner submits that this conclusion fails to adequately take into account the nature and functioning of the DA Career Program in which Stoller

was enrolled continuously from the time he first became an Army employee in 1967.

The Department of the Army Career Program for Civilian Personnel Administration was established in 1959 for the purpose of institutionalizing merit placement and promotion of civilian employees. As the program operated in the late 1960s and early 1970s, the relevant time frame in this case, DA Career Program employees did not apply for position vacancies in which they were interested. In fact, the Army neither advertised nor posted promotional opportunities for grades GS-13 through GS-15 in the civilian personnel administration career field. The administration of the Career Program was more closely analogous to that of the officer corps of the military services than it was to a large corporation in the private sector of the economy. Position vacancies were frequently unknown to employees who might have been potential applicants therefor. A particular Department of the Army office which had a civilian personnel vacancy would notify a headquarters office and would receive a list of "best qualified" employees, from which list the position vacancy would be filled. Without the imprimatur of the CSP that a particular employee was eligible for promotion to a certain grade level, there was no way in which that employee could ever get his name on a "best qualified" list for jobs at that level, and therefore would never be "fleeted up," in Navy parlance, to a higher level job. The system was a completely closed one, and end runs around it were virtually impossible.

In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), this Court proscribed employment practices "fair in form, but discriminatory in operation." As respected Title VII practitioners have concluded, the phrase "discriminatory

in operation" must be construed as equivalent to "perpetuates the consequences of forbidden discrimination."[5] The existence of a secret file, or dossier, on Jack Stoller, initially prepared as *post hoc* justification for the Army's violations of its own regulations in reassigning him from Vietnam, but subsequently perused by DA Career Program managers when considering him for overseas assignments and by members of the 1971 and 1972 CSPs when assessing his suitability for promotion would, if proven, unquestionably establish what amounts to a classic case of continuing discrimination. In Petitioner's view, to find the annual CSP decisions "discrete" is to effectively preclude the possibility of ever again finding that the operation of the DA Career Program was discriminatory as to anyone.

In the instant case, the series of discriminatory acts was indeed related by reason of the fact that Petitioner's illegal reassignment from Vietnam, the refusal to consider him for overseas assignments and 1971 CSP refusal to declare him eligible for promotion were all actions taken against him by DA Career Program managers under the aegis of that Program. Petitioner believes that it is the programmatic aspect of the actions taken against him which warrants this Court's most careful scrutiny.

The District of Columbia Circuit has found a continuing violation when an employer engaged in a persistent practice of issuing false, discriminatory references to prospective employers of a former employee (*Shehadeh v. Chesapeake & Potomac Telephone Co.*, 595 F.2d 711, 719, 725 (D.C. Cir. 1978)). The plaintiff in *Shehadeh*

---

[5] Jackson and Matheson, "The Continuing Violation Theory and the Concept of Jurisdiction in Title VII Suits," 67 Geo. L. J. 811, 821 fn. 60 (1979).

alleged a "long-lasting pattern of like events," possibly as many as two hundred discriminatory reports by the same group of personnel. In the Stoller case, the single thread which binds together the pre- and post-1972 acts complained of is the fact that the Career Program administrators and CSP decision makers continuously utilized the discriminatorily motivated secret file (or misinformation contained therein or extracted therefrom) in making program decisions which injured Stoller every time promotional opportunities or overseas vacancies came up. By analogy to *Shehadeh*, Petitioner estimates, and believes he could prove, that there were well in excess of two hundred civilian personnel specialist position vacancies and overseas assignment opportunities which were filled under the Career Program between 1969 and 1972. This case, like *Bethel v. Jefferson*, 598 F.2d 631 (D.C. Cir. 1978), involves "not an assortment of unrelated happenings, but a chain of connected events." 598 F.2d 631, 636.

Judge Wright's opinion for the Circuit Court panel, at the top of page 8 (Slip Opinion) (App. B, 9a) purports to distinguish the facts in *Shehadeh* from those in this case. Petitioner respectfully urges that the question whether the facts of this case are so similar to those in *Shehadeh* that the holding of that case must control here is a disputed factual issue which the Court of Appeals resolved by fiat, based on the panel's own idea of what the facts in this case were.

The decision below appears to create a conflict with the Fourth Circuit's decision in *Chisholm v. United States Postal Service, supra*, a class action which was brought by black employees of the Postal Service seeking injunctive relief and monetary compensation on the basis of allegations of racial discrimination in promotions on

the part of the employer. The Fourth Circuit conducted a detailed review of the promotional policies of the USPS in Mecklenburg County, North Carolina, and concluded that the programmatic aspect of the employer's promotion policy (665 F.2d 482, 495 n.18) compelled a finding that the employer had committed Title VII violations of a continuing nature (*id.* at 490, n.11).

This conflict between the decision below and the *Chisholm* case should be resolved by this Court.

III.

CERTIORARI SHOULD BE GRANTED TO SETTLE THE QUESTION WHETHER A MOTION FOR RECONSIDERATION BROUGHT UNDER RULE 60(b), F.R.C.P., MAY BE USED TO AMEND THE COMPLAINT WHERE NEW DECISIONAL LAW GIVES RISE TO A DIFFERENT LEGAL THEORY OF RECOVERY BASED UPON PREEXISTING FACTS.

When this case was pending in the U.S. District Court, defendant filed its motion to dismiss or, in the alternative, for summary judgment, on March 5, 1980. A supplement to defendant's motion was served on plaintiff on March 13, 1980. Plaintiff's Opposition to defendant's motion, containing a Statement of Points and Authorities, the Affidavit of Jack C. Stoller, and a Statement of Genuine Issues, was filed on April 11, 1980. On April 18, 1980, one week after the case at bar was submitted to the District Court on motion and opposition thereto, District Judge Aubrey E. Robinson, Jr., decided *Clark v. Alexander,* 489 F. Supp. 1236 (D.D.C. 1980). In that case, a retired Department of the Army employee brought a Title VII action alleging, *inter alia,* that she was deprived of equal opportunity for training, development, lateral reassignment and promotion under the Department of the Army Career Program for Civilian

Personnel Administration because of gender. The District Court held that the Army's Office of Employment Policy and Grievance Review (hereinafter OEPGR) employees were victims of prohibited discriminatory employment practices. 489 F. Supp. 1236, 1246.

> Moreover, the statistics and trial testimony indicate beyond doubt that the DA refused and continues to refuse to promote qualified women to high level policy making positions. The system, by providing the personnel boards with unfettered discretion, had and has a disparate impact upon classes of people protected by Title VII, viz. women and OEPGR employees. Not only did Plaintiff establish a prima facie case of discrimination, *McDonnell Douglas Co. v. Green, supra,* but she easily met her ultimate burden of proof. *Furnco Construction Co. v. Waters, supra.* The pervasive systemic defects inherent in the Career Program operated and continue to operate to discriminate against women, who have suffered from prior discriminatory employment practices, and OEPGR staff who enforce the EEOA. Although the system is facially neutral, disparate impact runs rampant in the DA Career Program. *Griggs v. Duke Power Co., supra*; *Teamsters v. U.S., supra.*

489 F. Supp. 1236, 1246.

Jack Stoller was an OEPGR employee whose duties included enforcement of the Equal Employment Opportunity Act from November, 1970 to August, 1978, within which time frame the *Clark* court found the Army's discriminatory practices were operating against OEPGR employees. It was also during this period that Stoller was attempting to obtain overseas employment (1970) and was delcared not promotable by the 1971 CSP, effectively the Program's promotional decision-

makers (these were the second and third claims of discrimination in Petitioner's District Court complaint).

Petitioner's Memorandum of Points and Authorities in support of his Motion for Reconsideration, filed May 8, 1981 (App. D, 27a-29a) pointed out to the trial court that as plaintiff was unaware of his status as a member of a class against which the Army's Career Program was operating discriminatorily (*i.e.*, OEPGR staff who enforced the EEOA), as the District Court had held in the *Clark* case, he was not in a position to allege that when he filed his complaint in this case. Accordingly, plaintiff asked the District Court to reconsider its ruling that the defendant was entitled to summary judgment, and grant plaintiff leave to amend his complaint. Plaintiff's motion was denied on May 22, 1981 (App. C, 23a).

The *Clark* case was appealed by the Government (*Clark v. Marsh*, 214 U.S. App. D.C. 350, 665 F.2d 1168 (D.C. Cir. 1981)), but on appeal the Secretary of the Army alleged no error in the District Court's findings of discrimination (665 F.2d 1168, 1171).

District Judge Robinson's opinion in *Clark* is particularly germane to Petitioner's case because of the finding that "It is abundantly clear in the instant litigation that the DA Career Program, as evinced by the regulatory violations, the resentment of OEPGR staff by personnel officers, and the dearth of referrals to qualified participants such as plaintiff, served to perpetuate past discrimination." 489 F. Supp. 1236, 1247. Ms. Clark was able to show that she had been discriminated against by the Army because she was female, and the Career Program perpetuated that discrimination. Jack Stoller sought the opportunity to show that he was discriminated against because he is Jewish, and the Career Program perpetuated that discrimination. Thus, appellant did

not intend to utilize the *Clark* case as a vehicle for introducing entirely new claims. The claim in this case has always been the same—that Stoller was discriminated against because he is a Jew.

The opinion below points out that Petitioner had not previously pursued administrative remedies for discrimination against him because of his OEPGR status. This observation misses the salient feature of the *Clark* holding—the recognition of a class of protected Army employees, of which class Stoller was a member. Until the *Clark* decision was rendered, that protected class did not exist as a legal entity, so it was obviously impossible for him to avail himself of it. Although Stoller was aware, of course, that he was an OEPGR employee from November, 1970 to August, 1978, he was equally obviously unaware of the fact that a federal court had found that, as a member of that staff whose duties included enforcement of the EEOA, the discrimination he had suffered as a Jew under the Army's Career Program was being perpetuated by his status as an OEPGR employee.

The opinion of the court below, in its consideration of the trial court's denial of Petitioner's Motion to Reconsider, states that the findings in *Clark* regarding discrimination against OEPGR staff are not relevant to the issues of religious discrimination in this case. Here again, the Court of Appeals panel is treating a question of fact as a question of law, in improperly substituting its judgment for that of the finder of fact, and doing so upon a record in which Stoller's status as a member of the OEPGR staff is barely mentioned.

Because of the fact that this case had never reached the trial stage in the District Court, therefore making Rule 59, F.R.C.P., inapplicable, Petitioner's counsel

found it necessary to bring the motion for reconsideration under the rubric of Rule 60. Although most opinions construing Rule 60(b)(6) speak in terms of newly discovered facts or evidence (*Harjo v. Andrus*, 189 U.S. App. D.C. 171, 581 F.2d 949 (D.C. Cir. 1978); *Good Luck Nursing Home, Inc. v. Harris*, 204 U.S. App. D.C. 300, 636 F.2d 572 (D.C. Cir. 1980)), there is a substantial body of case law to the effect that the Rule is available to bring to the trial court's attention any information which is central to the litigation and which indicates that the court's initial decision may be unjust (*In the Matter of Emergency Beacon Corp.*, 666 F.2d 754 (2d Cir. 1981); *United States v. Cirami*, 563 F.2d 26 (2d Cir. 1977)). The motion for reconsideration was also an attempt to acquaint the District Court with Petitioner's view of the relationship between the instant case and the *Clark* case through oral argument, as there had been no such argument prior to that Court's ruling on the Government's motion to dismiss, despite Petitioner's expectation that there would be.[6]

In cases factually very similar to the case at bar, the Third Circuit has held (*Holton v. Crozer-Chester Medical Center, supra*; *Lair v. Fauver*, 595 F.2d 911 (3d Cir. 1979)) that where a complaint has been dismissed and another court, which need not necessarily be a higher court, or even the same court in the same or a related proceeding, has decided a question in a manner which sheds light on issues raised in the case where the dismissal has been entered, the order of dismissal should

---

[6] "Where facts material to a jurisdictional time limit are in dispute, both fairness and analogy to Rules 12(b)(6) and 56 require that the court provide the parties a full opportunity to air their factual dispute." *Gordon v. National Youth Work Alliance*, 675 F.2d 356, 360 (D.C. Cir. 1982).

be vacated and the case remanded to the trial court to permit it to reconsider its ruling in light of the new law, or for consideration of a motion to amend the complaint. *Patterson v. American Tobacco Co., supra,* in the Fourth Circuit, is to the same effect, although in that case it was a decision of this Court which intervened between the federal district court's initial decision on the merits and the denial of motions for relief from judgment. *Patterson* is of the utmost significance here because it stands for the proposition that where a Rule 60(b) motion has been denied and the trial court is subsequently made aware of new law which directly affects the case, it is obligated to fully comply with the fact-finding requirements of Rule 52, F.R.C.P. This was part of the relief which Petitioner requested in his motion for reconsideration in the District Court when he requested oral argument on the motion (App. D, 25a), which request was denied (App. C, 24a).

The Fifth Circuit, in *Concerned Citizens of Vicksburg v. Sills, supra,* restated and there applied the well-established principle that an appellate court "is obligated to take notice of changes in fact or law occurring during the pendency of the case on appeal which would make a lower court's decision, though perhaps correct at the time of its entry, operate to deny litigants substantial justice." 567 F.2d 646, 649, quoting *Hawkes v. IRS,* 467 F.2d 787, 793 (6th Cir. 1972). In remanding to the District Court for a factual determination as to whether a predicate for federal jurisdiction in that case continued to exist, the Fifth Circuit's opinion went on to state:

> In such cases, "where circumstances have changed between the ruling below and the decision on appeal, the preferred procedure is to remand to give the District Court an opportunity to pass on the

changed circumstances". *Korn v. Franchard Corp.*, 456 F.2d 1206, 1208 (2d Cir. 1972).

567 F.2d 646, 650.

Petitioner submits that the court below should have followed this line of authority, and should have remanded the instant case to the trial court for a full factual determination as to the relationship between the *Clark* decision and the case at bar.

CONCLUSION

For the reasons set forth herein, it is respectfully requested that this Honorable Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

ROY TESLER, ESQ.
113 Rowell Court
Falls Church, Virginia 22046
(703) 534-9300
Attorney for Petitioner